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WEITERE INFORMATIONEN OK

Saturday, June 09, 2007

In defense of the judicial branch

Mencius Moldbug repeats a currently popular quote from Thomas Jefferson:

> As Jefferson said (in 1820): "To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is 'boni judicis est ainpliare jurisdictionem,' and their power the more dangerous as they are in once for life."

Jefferson was like almost all Whigs (the philosophy, not the parties) overly enamored of the legislative branch. (Bagehot's sovereignty of Parliament was the end point of this trend). Supreme Court tenure is the closest thing we have to political property rights and the resulting long time horizons in this country. It is also, at the risk of sounding parochial, a group of highly trained and experienced professionals. Would you rather have experienced software engineers writing -- or at least reviewing -- the code that runs on your computer, or bunch of frat boys who happen to speak smoothly and look good on TV?

With the possible exception of the independent agencies, the federal judiciary is the only branch with anything resembling long term political preferences. This is reflected, for example, in the very high quality and care put into their opinions, compared to the typical ideological quackery and other ignorant nonsense that generally passes for political debate in the Congress and the mass media and beyond.

The Court, it is true, has like the executive and legislative branches eventually succumbed to every long-term political trend. But it has severely attenuated many of the political fads most dangerous to liberty.

The current popularity (and abuse) of this Jefferson quote stems from a propaganda movement Jefferson would have abhorred: to invest our executive branch with arbitrary powers to act unchecked by our Constitution. The hot air in this whole debate about "who decides what is constitutional" also reflects the general ignorance about how separation of powers works.

To summarize separation of powers in one sentence: it is a formal system of mutual veto. Under our corporate charter here in the U.S., our Constitution, Congress gets a full veto at will because it must originate legislation. The President gets a partial veto at will. The Supreme Court's veto by contrast can only be of a very specific and careful kind. It only gets to decide what it *has* to decide when asked to decide a case in the face of conflicting laws. It must decide whether a statute conflicts with our corporate charter, the

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Nick Szabo

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Constitution. In such cases the charter must prevail. Articles of incorporation trump by-laws. And it must justify such a ruling in a legally professional opinion.

Nothing at all stops the Congress or the President from vetoing legislation because they believe it to be unconstitutional, and indeed this was quite normal in the first century of our Republic to have long debates about the meaning of the Constitution in the halls of Congress. This was long a habit, up to the 20th century, until Progressive legislators decided they didn't much understand or care for that archaic charter. Even Congressional supporters of constitutionalism rhetorically shifted the Reform-and-Jingo media flack they got from arguing that a desired law violates our charter to the relatively immune Court. (This was recently reflected in Senator Spector voting for the Military Commissions Act despite expressing his belief that it was unconstitutional -- the Court will take care of that, he said).

It is profoundly unfortunate that two branches have abdicated their responsibilities to our Charter, but the solution is hardly to strip the responsibility from the only remaining branch that still to some extent exercises it. What is most extremely dangerous to liberty for the executive to do is ignore such a Court opinion and proceed to execute a law that the Court has carefully explained violates our Constitution. This has happened to a disturbingly large degree in the current Bush Administration, for example with its warrantless NSA mass-surveillance pgoram. It most recently and famously occurred at a local level, where the Los Angeles County Sheriff released media celebrity Paris Hilton from jail in violation of her judicial sentence. She had been punished by the judge according to law for her repeated breaking of drunk driving and probation laws. This is one sheriff who should himself face some jailtime if we still live under "the rule of law, rather than of men," as the founders of our country intended.

This kind of arbitrary executive power, but of a ubiquitous nature rather than as a temporary response to national emergency or the quirk of a celebrity-worshipping (or bribed?) sheriff, is what the current criticisms of the Court, if they prevail, will result in. This outcome would destroy one of the few remaining controls against arbitrary power we have left.

Posted by Nick Szabo at 3:31 PM

10 comments:

Mencius Moldbug said...

I agree that most of the people who want to substitute something else for the Court's authority, certainly today and mostly in the past, are contemptible.

I also agree that the quality of the jurists on the Court today is higher than it has been in many, many years. It certainly is by far our best branch of government, which is good because it has by far the most power.

I still think Calhoun was right: the power of nullification and secession would have been the best way to preserve the Constitution. But judicial review is definitely a good second choice.

I take Jefferson's quote in a more abstract sense - really just as an anticipation of Acton's great aphorism. God knows Jefferson was wrong about many things. So to some extent was Acton. But that one will go down for the ages.

10:14 PM

nick said...

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I see that we agree generally about the U.S. Supreme Court, although I would not say that it is more powerful than either Congress or the Executive. When push comes to shove, Congress can legally take away Court jurisdiction over particular areas of subject matter. The Republicans almost succeeded with their continual efforts to remove federal court jurisdiction over abortions, which would have allowed state courts to "overturn" *Roe v. Wade*. And in extreme cases the Executive has, quite illegally, simply ignored the Court (as Andrew Jackson did explicity with the Cherokees, and G.W. Bush has probably done at least implicitly with surveillance and detention). The L.A. County Sheriff releasing Paris Hilton in violation of her sentence is an example in microcosm of this kind of executive nose-thumbing at the judiciary. Then of course there was FDR's "Court-packing" scheme -- Congress can probably also change the number of Justices, addding as many as desired to achieve the "right answer."

These threats can greatly influence important Court decisions as it tries to satisfy the other branches enough to avoid these underminings of its authority. They are among the major reasons why the Court has ultimately given in to the New Deal and every other major political trend.

BTW, I think you'll find that the Court has rarely ever been less libertarian than the rulemaking nexus of Congress and the regulatory agencies. Quite often it ratifies unlibertarian positive-rights statutes and regulations, but when it creates rights they are almost always of the libertarian negative variety. (There are of course also many equal-rights cases like public school desegregation which are largely orthogonal to the positive-negative rights axis).

There's a possible huge exception to that claim (or possibly not) -- Chevron deference. This joins Footnote Four in the pantheon (or layers of hell) of cases crucial to the rise of the regulatory state.

My instinct is to say that *Chevron* is a profoundly unlibertarian decision, as it gives more power to regulatory agencies, but upon reflection I wonder if it is true. It is of course profoundly undemocratic. It effectively weakens the ability of Congress to control the regulatory agencies. Congress is spread far too thin to competently write clear statutes, so there are usually vast gaps and ambiguities for the regulatory agencies to play with.

So the real question for *Chevron* may be, is the rulemaking process of Congress more or less libertarian the the rulemaking process of the agencies? The answer, unless one reflexively supports "democracy", is by no means clear. If industry lobbying on average reduces regulatory burden (as it did in *Chevron*) more than it increases it, and (as is likely) the lobbying of regulatory agencies (experts on narrow subject matter) is more efficient than lobbying Congress (experts at nothing), then *Chevron* will tend to produce more libertarian rules. I'd love to get your opinion on the matter.

BTW, it may be just a few short steps from *Chevron* to Juristopia. This is left as an exercise for the student. :-)

In Juristopia, none of these attacks on the Court by other branches would be possible, so those who don't like Court verdicts would then have much more reason to complain about Court powewr.

As for Calhoun: I agree it might be a good idea for States to be able to nullify federal statutes and regulations, (i.e. get rid of the Supremacy Clause). Even better would be to allow persons by contract to nullify any laws as they pertain only between them (by expanding choice-of-law clauses). I'm nevertheless strongly in favor of a 14th Amendment-type incorporation regime to make the States respect basic procedural rights, imposed centrally upon any coercive procedure that involves high exit costs (e.g. habeus corpus appeals of imprisonment). I am opposed to the ability of any high-exit-cost regime to secede from respecting basic procedural rights.

8:40 PM

Mencius Moldbug said...

Sorry for the slow reply - I was on vacay (second prize: *two* weeks in Cleveland...)

Chevron deference is fascinating - thanks for the link. It's amazing how unknown these essential bulwarks of our legal system are. What high school civics class mentions Footnote Four, let alone Chevron deference?

I suppose that if you privatized agencies as they are, you could consider Chevron deference a sort of franchise. But I fear the business model is questionable.

The essential problem with Chevron is that the doctrine of nondelegation has been long since trashed. In practice, it is pretty much the agencies that run Congress rather than the other way around. (My mother used to be a budget and policy analyst for DOE.) Given the existing system, government by lawsuit is clearly a worse choice than government by unaccountable regulators, so I tend to favor deference simply on grounds of efficiency. But it's like saying I'd rather be attacked by a wolf than a bear. A self-regulating regulatory system is unstable in all kinds of strange ways, and I don't think it can be characterized as generally more or less libertarian than one with the added component of case law that any relaxation of Chevron deference would be sure to generate.

Did I really praise Calhoun on nullification? I suppose I did. I certainly agree with him on secession, on both merits and law. The Webster-Clay-Lincoln theory that "the Union is older than the States" is laughable. Whereas Calhoun was certainly wrong about nullification on the law (the Supremacy Clause is pretty clear). On the merits - I go back and forth.

9:35 PM

Anton Sherwood said...

It's a long time since I read the Federalist Papers, so this may be distorted but — one thing I took away from them was that their notion of "checks and balances" had far less to do with tension between the Three Branches (one of which is appointed by the others, come on now!) than between Federal and State authorities; if they didn't openly support Nullification they came mighty close.

If I could time-travel to the Convention I'd urge no Federal judiciary: let any case of Federal jurisdiction be tried in any State; each side gets one appeal to another State of their choice, and if two courts agree their decision is final (adapting an idea of Murray Rothbard).

Failing that, I'd defang the court-packing threat and avoid the "jackpot effect" by allowing one appointment to the Supreme Court during each term of Congress, allowing the size of the court to vary; this would, surprisingly, have resulted in almost exactly the same number of appointments as there have in fact been.

10:03 AM

nick said...

MM: "The essential problem with Chevron is that the doctrine of nondelegation has been long since trashed."

As it happens I also wrote a paper on the nondelegation doctrine. (There are also some good descriptions of the Whig separation-of-powers ideas and schemes in there). Modern enabling statutes (setting up new agencies) bear striking resemblance to broad grants of political property -- practically franchises but with few of the controls and formality that would come from making them property rights. In theory this is not political property and the Congress could disband an agency, but this is rare. Reorganizations like the Homeland Security Department are slightly more common. (If they were really property rights reorganizations would be probably be far more common, as it is with public stock companies).

MM: " The Webster-Clay-Lincoln theory that "the Union is older than the States" is laughable."

Perhaps, but the Continental Congress certainly existed before there were any States. Both the States and the United States were created at the same time. The American colonies certainly were not sovereign -- see their charters. Declaring them sovereign is a crime against political property rights. And federal courts (albeit admittedly not federal power generally) has been a great source of libertarian constraint on the States, up to and including the many advances in criminal procedure made by the Warren Court.

Anyway, in a world where it takes five hours to get from one end of the U.S. to another, and one can communicate anywhere on the globe instantly, the idea of bundling law with territory is starting to look quite primitive. Do you really want the Internet packets you send off every day all over the globe to make you subject to thousands of different laws and political systems? The future lies in

unbundling territory from the law and in increasing specialization in law and politics. Bermuda (insurance law) and Delaware (corporate law) are great examples of legal competition to follow. If we can do it right, we can radically increase the good kinds of legal competition -- ex ante choice of forum and choice of law -- without thousands of little city-states, asteroid colonies, Mancur Olson's roving bandits, or Patri Friedman's boats. A good exercise is to start with Internet law: can we and the computer operator on the other end agree on a single law to govern our packets?

AS: "If I could time-travel to the Convention I'd urge no Federal judiciary: let any case of Federal jurisdiction be tried in any State; each side gets one appeal to another State of their choice, and if two courts agree their decision is final (adapting an idea of Murray Rothbard)."

This is an interesting idea, but how is the second State chosen, and what if they disagree, do we choose a third State? Take the majority of two out of three as final? And are there any actual historical examples of this we could study?

1:34 PM

Mencius Moldbug said...

nick,

The problem with agencies is that they are self-managing and have no formal ownership structure. This puts them in the same category as, say, a coal mine in Donetsk in 1993.

The United States - plural - were declared "free and sovereign states" in the Treaty of Paris. This between, of course, the Continental Congress and the former sovereign. How much more unambiguous can you get?

In the 1780s, the word "state" meant "state." The current meaning of "province" is a strictly 19th-century usage. I mean, geeze, talk about Orwell.

People whose communication is purely virtual should be free to interact under any rules they choose for themselves. I believe this was actually once the idea of contract law.

As of course you are well aware, "law" in the usual sense of the term simply creates a default contract for those who interact casually in ways that make agreement on individual terms not cost-effective. For example, two drivers sharing the same road need a standard agreement for what happens if A crashes into B - thus tort law.

These unplanned and uncontrolled interactions exist only in the physical world, where software does not apply, and so correspond quite nicely to geography. Moreover, in cases where they do cross geographical boundaries (you steal my car in Monaco and flee to San Marino), the problem of negotiating treaties between jurisdictions is by no means as hard as it seems.

Such a physically hierarchical legal structure, federalism in the original sense of the world, is a tremendous defense against tyranny and legal complexity. It is true that legal complexity, such as we have these days, tends to make this cellular structure less practical, but I consider this a benefit, as is anything that interrupts the inexorable progress toward the worldwide "big ball of mud" design pattern...

8:06 PM

nick said...

MM: Treaty of Paris

Calling something a "State" does not make it such. Our "States" were sovereign states neither before the Revolutionary War nor after the Constitution (the Treay Power clearly rests external sovereignty with the federal government, and there is also the Supremacy Clause), nor were they completely sovereign under the Articles of Confederation. Correct me if I'm wrong, but most if not all

diplomacy leading up to and after the Treaty of Paris was conducted by ambassadors chosen by the Continental Congress, not from the individual States.

And regardless of this history, States if they ever were sovereign have long since lost their sovereignty by adverse possession. Nor is it all a good idea from a policy perspective to advocate anything but a further weakening of States. In particular the notion of the "police power", which is found nowhere in the Constitution, needs to be abolished.

"As of course you are well aware, "law" in the usual sense of the term simply creates a default contract for those who interact casually in ways that make agreement on individual terms not cost-effective."

Law *should* be like this, but it's often not. The two most important examples: the range of choice for choice-of-law and choice-of-forum clauses is far too narrow, and the ability to set penalties for certain breaches of contract is far too limited. These two areas should be the focus of efforts to make contracts more law-like and provide more of the good kind of (i.e. ex ante) legal competition. This kind of incremental change is far more important than selling shares in government or other such fascinating but hubristic ideas.

12:59 PM

Mencius Moldbug said...

I agree 100% with the argument from adverse possession, which makes all other issues null - at the present time.

But there is simply no question that the states in the Congressional period were sovereign. I usually try to avoid the *argumentum ad Googleum*, but...

Nor is there any question that the drafters of the Constitution made a substantial mistake by failing to resolve the question, allowing both sides (Nationalist, aka "Federalist," and Democratic) to assume that history would confirm their view of the matter. I have seen exactly the same trick pulled in a zillion standards meetings - this IETF crap don't fool me for a minute.

To hubris, on the other hand, I plead guilty! But, you know, it sometimes happens that large changes are easier to make than small ones.

I am especially down with the penalties for breach of contract.

For example, libertarian theorists have enormous problems with insider trading, because the Rothbardian theory of ethics doesn't allow people to voluntarily submit to contractual penalties that deprive them of liberty. Yet the profits of insider trading are such that no mere disgorgement is likely to be an effective deterrent. Ask any libertarian whether a man can sell himself into slavery, or impose debt slavery as a condition of failure to perform on a contract, and you will be met with an enormous cloud of verbiage.

9:49 AM

nick said...

I certainly would not go anywhere near as far as saying somebody could sell themselves into slavery. As with most other political issues, expanding freedom of contract without creating such pathologies requires close attention to law as well as creativity to solve.

As a first cut I'd say that contractually specified penalties and punishments (far beyond today's "liquidated damages) should be allowed in infinite variety, but subject to a number of limitations. Since they are punitive in nature, they would be limited in ways similar to how today's criminal law is or should be limited. Here are some suggested limitations:

* Such contracts would be governed by the most heightened formation requirements: requiring a writing, no procedural unconscionability, etc. (Indeed, I'd require a video tape of the non-drafting party reading and initialling the entire contract -- evidence that can be analyzed for signs of duress and incapacity).

* Penalties can only invoked where the contract specifies a mental state requirement: negligence, recklessness, knowledge, or purpose (to use the Model Penal Code categories). If the contract doesn't say, purposeful breach must be proved. There can be no strict liability that invokes contractual penalties.

* By analogy to the principle that courts should not take property from A and give it to B except to redress a harm A has done to B, I'd say you can't agree to give away your property or labor under such penalties. I'd thus increase the "peppercorn" consideration requirement to an economically modern version of the Roman law "just price" requirement where penalty clauses are invoked to help enforce the contract. I'd also put a short laches time limit on penalties (e.g. you can invoke a penalty only if the breach occurs within N years after contract formation -- thereafter you must renegotiate the contract). This prevents the selling-self-into-slavery problem.

* All such clauses would trigger due process / common law rights applicable to a criminal trial like the right to a jury trial, the right to confront witnesses, and so on.

* To invoke monetary or equitable penalties the breach of contract would have to be proved to clear-and-convincing evidence rather than more-probable-than-not standard for contracts. To invoke criminal-like penalties (e.g.) jail breach would have to be proved beyond reasonable doubt. Death penalties would be forbidden (hard to reverse that kind of experiment!)

2:21 PM

Mencius Moldbug said...

An interesting list, and you have gone well beyond the bounds of my expertise on several of these.

I am especially interested by the just-price "peppercorn" clause, which I don't quite understand. Maybe you could expand slightly on this?

One libertarian way to describe this set of restrictions on contracts is with the familiar "seal of approval" paradigm. Ie, if you sign a contract that does not receive the seal of approval as fair and reasonable from your contract-approving company, you might as well be going over Niagara Falls on a barrel.

And since in a libertarian world it is perfectly fine to go over Niagara in a barrel, fine. But good luck finding a jurisdiction which is willing to enforce unapproved contracts! Frankly, it is unlikely to be worth the hassle for any such "protection agency."

8:32 PM

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